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IN THE

Supreme Court of the United States

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Supreme Court, U.S.
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No. 71-162

DAVID E. ROTH,

Respondent,

vs.

BOARD OF REGENTS OF STATE COLLEGES, ET AL.,

Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF.

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PETITION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF.

Now comes the American Federation of Teachers by its General Counsel, John Ligtenberg, and petitions the Court for leave to file a brief as *amicus curiae* in the above captioned cause and in support thereof states as follows:

1. The American Federation of Teachers is a union of teachers affiliated with the AFL-CIO. The overwhelming majority of its members teach in the public schools. The American Federation of Teachers is composed of approximately 1,000 locals located throughout the United States with more than 250,000 members. Of the 1,000 locals approximately 200 are local unions at the college and university level.

2. The American Federation of Teachers and its local unions and many of its members have been involved in much litigation throughout the United States concerning dismissals of teachers. Many of these cases have been filed in United States District Courts under Section 1983 of the Civil Rights Act, and others are being considered. The American Federation of Teachers has traditionally provided financial assistance for the defense of members whose employment is terminated.

3. The American Federation of Teachers is deeply interested in the case at bar, as the decision of this Court in the case at bar will have a substantial effect upon the rights of its members, and may well have decisive effect upon many of these cases.

4. A request has been made of the attorneys representing the appellant and appellee seeking their consent to the filing of a brief *amicus curiae* by the American Federation of Teachers.

WHEREFORE, petitioner asks leave that its brief *amicus curiae* may be filed with this Court.

Respectfully submitted,

JOHN LIGTENBERG,
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AMICUS CURIAE BRIEF.

I.

PUBLIC COLLEGE TEACHERS ARE ENTITLED TO A HEARING WHEN TERMINATED.

The question for decision is whether a State university which refuses to continue a teacher in his employment without affording him the opportunity for an evidentiary hearing prior to termination denies the teacher procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

In recent analogous cases this Court has ruled that termination of government benefits or privileges does require an evidentiary hearing. This was true in the case of termination of benefits to welfare recipients, *Goldberg* v.

Kelly, 397 U. S. 254 (1970) and revocation of driver's license, *Bell* v. *Burson*, 402 U. S. 535 (1971).

In those cases this Court weighed the impact of the withdrawal of benefits on the individual against the substantive and administrative needs of the government. Applying the same standards to the case at bar it is apparent that a college teacher is entitled to a hearing before his employment is terminated.

Several considerations support this conclusion. Initially, the college teacher like the lawyer or doctor, makes a substantial investment both in terms of money and time in preparing for his professional career. When a teacher seeks employment, his credentials are subject to considerable scrutiny. He simply does not walk off the street and begin teaching. Hence there is an initial recognition by university officials that the teacher is sufficiently competent to be given classes for a year or more. The relationship is a serious matter and not idly established by officials or employee.

The effect of termination of employment is profound. Not only are the teacher's professional reputation and future employment possibilities substantially impaired, but the teacher must pull up roots, disassociate himself from colleagues and neighbors and move to another locale to pursue his career.

Balanced against the impact on the teacher, the substantive and administrative needs of the university are miniscule. If non-renewal is warranted it should not be unduly difficult for presumably well educated officials to specify the reasons for their decision.

Requiring college officials to support their decisions with facts should be no burden. To the extent that it is a burden it is so because college officials too often have escaped the responsibility for justifying their decisions and

have lapsed into decision making without really having reasons for decisions. This, of course, is at the root of the current issue before this court.

Traditionally, colleges have four or more levels of influence. A Department Chairman makes a recommendation to a Dean, the Dean makes a recommendation to the President and the President makes a recommendation to the Board. Special advisory committees at the various levels are likely to be also involved in the process.

When efforts are made by a teacher to find out why he is being terminated he is confronted with lower ranking administrators who claim they only have power to recommend and higher ranking administrators who disclaim responsibility because they only were "relying on the recommendations" of those at the lower levels. In a very real sense the teacher is confronted with a "non-decision."

Moreover, when the reasons for termination are finally smoked out they are often couched in language intended to disguise rather than to communicate. Hence, "Mr. Smith's professional training and service are not compatible with the goals of the Department" has a pleasant ring but says nothing.

Having to conduct business in an orderly and understandable manner may be considered a burden on college officials unused to such practices. However, it should be considered a benefit and not a reason for denying scrutiny through the process of a hearing. This Court touched on the difficulties administrative agencies have in reaching correct decisions in *Goldberg* v. *Kelly*, 397 U. S. 266. This court concluded that not only would the due process rights of welfare recipients be protected but in so doing it was likely that the Welfare Agency might be better run.

Whether or not the possibility of a hearing would improve the administration of colleges and universities, it is

clear that allowing teachers a hearing imposes no real burden on school officials.

II.

THE RIGHT OF TEACHERS TO A HEARING IS PARTICULARLY PROPER BECAUSE TEACHERS NEED PROTECTION IN THE EXERCISE OF "ACADEMIC FREEDOM" AND THE EXERCISE OF OTHER RIGHTS.

Whether citizens have been legitimately concerned that teachers might actually attempt to violently otherthrow the government or whether there has been a desire to simply maintain orthodoxy in the classroom, it is apparent that teachers, as a group, have been the subject of unfounded suspicions and restrictions which impinge on their constitutional rights.

Teachers have been fired for criticizing school officials. *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). They have been required to attest their loyalty. *Weiman* v. *Updegraff*, 344 U. S. 182 (1952); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); and *Connell* v. *Higgenbotham*, 403 U. S. 207 (1971).

These cases clearly establish that teachers have full constitutional rights. However, the recurrence of these cases demonstrate the need teachers have for protection in the exercise of their rights.

In *Shelton* v. *Tucker*, 364 U. S. 379, 387 (1960), this Court said the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." In *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968) the Court said it would not fail to apply "the First Amendment's mandate in our educational sys-

tem where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." In *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 513 (1969), this Court said: ". . . we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."

Unless teachers are entitled to notice and a hearing there is a substantial danger that termination based upon clearly unconstitutional reasons such as the political associations of a teacher will go unchecked. Often a teacher is dismissed and everyone knows or believes that it was because of protected activities. A hearing will go far toward confirming or negating such beliefs or suspicions. Hence, not only is the individual teacher's interest protected but the general academic community is more likely to exercise rights with less fear of retaliation.

But even in cases where substantive constitutional rights are not effected the hearing may reveal that the government officials simply had no basis for their decision. Under these circumstances a state remedy may be available for redressing the arbitrary and capricious acts of government.

But whatever the results of a hearing it serves a number of interests including a teacher's right to due process.

III.

THE HEARING SHOULD BE CONDUCTED BEFORE AN IMPARTIAL TRIBUNAL.

One of the aspects of this and other Court of Appeals decisions with which this *amicus curiae* takes issue is the remanding of cases to school officials for the hearing.

Allowing school officials to have substantial control over the selection of a hearing panel may have the net result of providing judicial approval of the administrative paper shuffling described under point I.

The power to decide a controversy, even though later subject to judicial review, is far too important to entrust to one of the participants to a dispute. One of the functions of 42 U. S. C. 1983 is to provide a forum which is insulated from partisan or parochial influences. Unless additional safeguards are imposed by this Court, both the aims of 42 U. S. C. 1983 and the Constitution requirements of due process are in jeopardy.

Whether proceedings are before an administrative agency or a court, litigants are entitled to a hearing before a fair and impartial trier of the facts. This Court has so held on numerous occasions: *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *In re Murchison*, 349 U. S. 133 (1959); *Morgan* v. *United States*, 304 U. S. 1 (1938); and *Commonwealth Coatings Corporation* v. *Continental Casualty Co.*, 393 U. S. 145 (1968).

The last cited case stated the rule rather simply

> ". . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Nor would such a safeguard impinge on the prerogatives of school authorities. The long experience under the N. L. R. A. adequately demonstrates that management discretion can be and is protected. If school administrators, who by their status, possess obvious advantages over teachers when testifying, are fearful of submitting the justification for termination of employment to a truly impartial tribunal then such decisions are suspect.

Probably the greatest single source of difficulty in present day tenure dismissal cases (aside from the cost) is

that boards of education sit as tribunals to decide whether to dismiss a teacher that they have already decided to dismiss. The outcome is predictable with 99% accuracy. The net effect is that each side merely attempts to make a record. In fact, success can be better obtained on review by the teacher if the board was patently unfair.

We, therefore, urge this Court to require that hearings be conducted by genuinely impartial tribunals.

IV.

THE INSTANT PLAINTIFF AND OTHER TEACHERS TERMINATED WITHOUT A HEARING SHOULD BE AUTOMATICALLY REINSTATED.

The teacher who fails to make timely demand for a hearing or otherwise fails to follow procedures is foreclosed from maintaining an action against the educational institution. This is true under tenure laws, civil service statutes and administrative regulations.

Where, as here, officials have failed to provide a hearing required by due process they should not be given a second chance to make their case.

This court has in the past refused to go to the merits where there has been violation of procedural rights but has simply reversed. *Vitarelli* v. *Seaton,* 359 U. S. 535 (1959); *Greene* v. *United States,* 376 U. S. 149 (1964); *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963).

Nor does there appear to be any need for an exception to this principle. If a teacher is manifestly bad, then there should be no difficulty in justifying the termination in the first instance.

We suggest that the Court reaffirm the established principle that where an administrative agency has failed to follow constitutional procedures it should not be allowed to reopen the case.

CONCLUSION.

The American Federation of Teachers supports the position that if college teachers are terminated they are entitled to a hearing and when denied a hearing they are entitled to automatic reinstatement.

Respectfully submitted,

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